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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

ERIC J. WEISS & ERNESTO HERNANDEZ,
v. *Petitioners,*

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Military Appeals

**BRIEF OF THE UNITED STATES AIR FORCE
APPELLATE DEFENSE DIVISION AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

ROBERT I. SMITH
Captain, United States Air Force
Counsel of Record

JAY L. COHEN
Lt. Colonel, United States Air Force
Chief, Appellate Defense Division

FRANK J. SPINNER
Lt. Colonel, United States Air Force
Chief Appellate Defense Counsel

Appellate Defense Division
Air Force Legal Services Agency
172 Luke Avenue, Suite 208
Bolling AFB, DC 20332-6128
(202) 767-1562

Counsel for Amicus Curiae

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INTEREST OF THE AMICUS CURIAE

The United States Air Force Appellate Defense Division's interest lies in the fact that the decision of this case can potentially reach virtually every United States Air Force court-martial. As counsel for every Air Force member convicted at court-martial and sentenced to death, one year or more of confinement, or a punitive discharge, the United States Air Force Appellate Defense Division is compelled to submit this filing. Given our unique expertise in military law, we herein endeavor to provide the Court with a history of the development of the positions of military trial and appellate judges.

ARGUMENT

THE COURT OF MILITARY APPEALS WRONGLY APPLIED MILITARY HISTORY AND ERRED BY LIMITING ITS ANALYSIS TO MILITARY HISTORY WHEN DECIDING WHETHER OR NOT DUE PROCESS REQUIRES MILITARY TRIAL AND APPELLATE JUDGE'S TO HAVE THE PROTECTION OF FIXED TERMS OF OFFICE.

A. Anglo-American Legal Tradition Requires Fixed Judicial Terms of Office for Trial and Appellate Judges.

Historical development of military justice in the United States Armed Forces. Congress created the offices of military judge and appellate military judge in the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. This Act was the culmination of "a gradual expansion of judicial authority" that began about 1920. Homer E. Moyer, Jr., *Justice and the Military* (1972), § 2-620, at 534. Prior to the implementation of the Uniform Code of Military Justice (UCMJ) in 1951, the various branches of the military had different criminal justice arrangements. The Army and, later, the Air Force were governed by the Articles of War while the Navy and Marine Corps were governed by the Articles for the Government of the Navy. Yet another statute governed the Coast Guard and its predecessors, the Revenue Cutter Service and the Life Saving Service. See generally Moyer, *supra*, §§ 1-111 to -116, at 8-9. The development of military justice under the Army and Navy will be discussed separately below.

The pre-UCMJ Navy. "American courts-martial in the 19th century had no judges," 1 Francis A. Gilligan & Fredric I. Lederer, *Court Martial Procedure* (1991), § 14-10.00, at 514 & n.2. Under the Articles for the Government of the Navy, there was no "judicial or even quasi-judicial officer. The exercise of judicial authority in the Navy was vested in the court as a whole." Henry

A. Cretella & Norman B. Lynch, *The Military Judge: Military or Judge?*, 9 Cal. W. L. Rev. 57, 70 (1972). There was no law member of the court, Robert S. Pasley & Felix E. Larkin, *The Navy Court-Martial: Proposals for Its Reform*, 33 Cornell L. Rev. 195, 208 (1974), but rather a functionary known as the judge advocate, whose duty was to prosecute and to advise the court. Cretella & Lynch, *supra*, at 66 & nn.66-68. For appellate review, the Navy relied on a board of review that had no statutory basis. Its recommendations were not binding. Pasley & Larkin, *supra*, at 223.

The pre-UCMJ Army. Nineteenth century Army courts-martial also had a judge advocate. The judge advocate wore numerous hats. He was not a judge, and to the limited extent his role even resembled that of a judge, his power was solely advisory. In 1920, the Articles of War were amended to require that a "law member" be detailed to sit as a member on any general court-martial. National Defense Act of 1920, 41 Stat. 759, 787-812. If a member of the Judge Advocate General's Department was available, he had to be so detailed. If no member of the Judge Advocate General's Department was available, then a specially trained member of another branch of the Army had to be detailed. The law member "was not a judicial officer, but merely an 'evidentiary referee.'" Cretella & Lynch, *supra*, at 69. As explained in the Army's official summary of the evolution of the military judge's role and powers:

The law member was a voting member of the courts. His vote was equal to that of other members, and he participated fully in all closed, deliberative sessions. His legal powers were generally only advisory. He ruled initially on all interlocutory questions except challenges, but other court members could object to and overrule his determination by vote. He ruled finally on the admissibility of evidence, but the statute defined "admissibility" very narrowly.

Department of the Army, *Legal Services: Trial Procedure* § 3-2a (Apr. 20, 1990) (DA Pam. 27-173) (foot-

notes omitted). In 1948, the so-called Elston Act, Selective Service Act of 1948, Title II, 62 Stat. 604, 627-44, modified this arrangement by requiring that the law member be an attorney certified by the Judge Advocate General. *Legal Services: Trial Procedure, supra*, § 3-2b.

The law member still participated in the court's closed sessions. With three exceptions, however, his rulings on interlocutory questions became final. The three exceptions were challenges, motions for a finding of not guilty, and questions concerning the accused's sanity.

Id. (footnotes omitted).

Until 1920, appellate review was performed by departmental officials on an administrative basis. In that year, as a result of widespread dissatisfaction with the administration of military justice during World War I, including revulsion over the hasty execution of death sentences imposed on a group of 13 black soldiers in 1917, Congress created a board of review. *See generally* 1 Johnathan Lurie, *Arming Military Justice: The Origins of the United States Court of Military Appeals, 1775-1950* 69-70 (1992); Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 Mil. L. Rev. 1, 3-4 (1967). That board was the predecessor of the boards of review established by the UCMJ.

Evolution under the UCMJ. The UCMJ superceded the Articles of War, the Articles for the Government of the Navy and the Disciplinary Laws of the Coast Guard. It created an official known as the law officer, who had to be assigned to any general court-martial, and was required to be a lawyer. Unlike the Army's former law member, the law officer was not a voting member of the jury. "A review of the legislative history of the UCMJ . . . leads to the conclusion that the question as to whether Congress intended to create a judge, or merely to remove the law officer from membership on the court, can-

not be definitively answered." Cretella & Lynch, *supra*, at 79; *see also* Robert E. Miller, *Who Made the Law Officer a "Federal Judge"?*, 4 Mil. L. Rev. 39 (1959). Nonetheless, over the years, as a result of provisions of the *Manual for Courts-Martial* and a series of decisions of the Court of Military Appeals, the law officer became more and more of a judicial officer. Moyer, *supra*, § 2-620, at 535.

Even though the UCMJ applies to all of the services, the Navy and Army did not hold the same view of the law officer. Thus, the Army

took additional steps to improve the law officer's status. First, [it] established the Law Officer Program in 1958. Under the program, law officers were required to be qualified judge advocates, normally on a 3-year tour of duty. The law officers became members of the Field Judiciary under The Judge Advocate General's direct control. In turn, the Judiciary assigned its members to duty stations within judicial circuits. Although the law officer might be assigned to a convening authority's station, the law officer was not a member of the convening authority's command; and neither the convening officer nor his staff judge advocate supervised the law officer's performance of his official duties.

Legal Services: Trial Procedure, supra, § 3-2c (footnotes omitted), *citing, inter alia*, Meagher & Mummey, *Judges in Uniform: An Independent Judiciary*, 44 J. Am. Jud. Soc'y 46 (1960); Frederick Bernays Wiener, *The Army's Field Judiciary System: A Notable Advance*, 46 A.B.A.J. 1178 (1960).

In 1962, the Field Judiciary was redesignated as the United States Army Judiciary and the law offices were removed from the direct control of the Judge Advocate General. *Legal Services: Trial Procedure, supra*, § 3-2c (footnote omitted). The Navy and Marine Corps created a judicial structure similar to the Army's in 1962, after a brief pilot program. Moyer, *supra*, § 2-620, at 536.

The Military Justice Act of 1968. In 1968, Congress transformed the law officer into the military judge and provided that a military judge would be used in every general court-martial. "The creation of the office of military judge was not simply a name change; important new duties and responsibilities were placed upon the military judge." Stanley T. Fuger, *Military Justice, Variation on a Theme*, 66 Conn. B.J. 197, 201 (1992). Military judges were barred from participating in the members' closed sessions. On questions of law, their rulings became final. In addition, except for capital cases, bench trials were now permitted. The 1968 changes "vested in the presiding judicial official the additional authority necessary for him to emerge as 'judge,'" Cretella & Lynch, *supra*, at 87, and created a true judge. 1 Gilligan & Lederer, *supra*, § 14-10.00, at 516. The provision allowing bench trials "appeared to remove any doubt that the military judge exercises true judicial authority." Stevenson, *The Inherent Authority of the Military Judge*, 17 A.F.L. Rev. 1, 5 (1975).

Historical Development of British Military Justice. The connection between judicial independence and protected tenure, life or otherwise, is at the heart of the Anglo-American legal tradition. E.g., Henry J. Abraham, *The Judicial Process* 41 (5th ed. 1986); Shimon Shetreet, *Judges on Trial: A Study of the Appointment of the English Judiciary* 270 (1976).

In England, the connection between judicial independence and security in office is manifest in the path which leads from Coke's dismissal in 1616, through the achievement of service during good behavior rather than at the pleasure of the throne in § 7 of the Act of Settlement, 12 & 13 Will. 3, ch. 2 (1701), to the abrogation in 1760 of the rule that judicial patents had to be reissued upon the death of the monarch. Sir John Sainty, *The Judges of England 1272-1990* 4 & n.11 (1993) (Selden Society Supp. Series vol. 10), citing 1 Geo. 3, ch. 23, § 1; see generally Theodore F.T. Plucknett, *Taswell-Langmead's*

English Constitutional History 460-66 & n.51 (11th ed. 1960), citing 10 William S. Holdsworth, *History of English Law* 415 n.10 (1938).

Except for the Lord Chancellor, who is a member of the Government, judges of the English superior courts have long enjoyed life tenure during good behavior. See generally Sainty, *supra*, at 4, 20, 43, 57-58, 90, 105, 137, 143-44, 157, 163, 181, 187, 229; Supreme Court Act, 1981, § 11(3) (Eng.); Appellate Jurisdiction Act, 1876, 39 & 40 Vict., ch. 59, § 6. Circuit judges are appointed to serve through age 72 subject to removal for incapacity or misbehavior. Court Act, 1971, §§ 17(1), (4) (Eng.). Recorders are appointed for specified terms of office, extendable for stated periods and terminable for cause. *Id.* §§ 21(1), (4). The Courts-Martial Appeal Court was established by Parliament in 1951. Courts-Martial (Appeals) Act, 1951, 14 & 15 Geo. 6, ch. 46. It consists of judges drawn from various British courts and other persons who are appointed for "such term as may be determined by the Lord Chancellor" prior to appointment. Courts-Martial Appeals Act, 1968, ch. 20, § 2 (Eng.).

Congress and fixed terms of office. Where not constrained by Article III, Congress also has overwhelmingly favored fixed terms rather than at-pleasure judicial appointments. Under the Northwest Ordinance, which Congress ratified after the Constitution took effect, 1 Stat. 51 n.(a), the commissions of the three judges of the territorial court were "to continue in force during good behavior." Over time, the territorial model changed to appointments for terms of years. Presidents could and did remove territorial judges, e.g., *McAllister v. United States*, 141 U.S. 174, 185 (1891),¹ but the judges were at least afforded fixed terms.

¹ Justice Field, dissenting with Justices Gray and Brown, wrote:

The idea essentially appertaining to and involved in the judicial office is that its exercise must be free from restraint,

Territorial judges are now appointed for fixed terms subject only to removal by the President for cause. Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 Cal. L. Rev. 853, 878 n.138 (1990); 48 U.S.C. §§ 1424(b) (1988) (D. Guam), 1614(a) (D.V.I.), 1694(b) (D.N.M.I.) From the perspective of the potential chilling effect on judicial independence, there is a substantial difference between a judge who serves under those conditions and one who serves without even a nominal term. The difficulty of securing presidential assent to a removal and the danger of adverse publicity and political fallout from such an act serve as checks on the exercise of the removal power. These safeguards do not exist when removal is effected by facially routine, low-visibility military personnel actions such as orders to a new duty assignment. This aspect of the lack of fixed terms is particularly aggravated by the fact that military trial and appellate judges are not appointed by the President with the advice and consent on the Senate.

A recent and ironic illustration of Congress's recognition of the link between fixed terms and judicial inde-

without apprehension of removal or suspension or other punishment for the honest and fearless discharge of its functions within the sphere of the jurisdiction assigned to it. No one, in my judgment, under our system of law, can be appointed a judge of a court of record having jurisdiction of civil and criminal cases, to hold the office at the pleasure and will of another. No such doctrine has been maintained in England since the [Act of Settlement], "for the further limitation of the crown and better securing of the rights and liberties of the subject," passed in 1700, one of the great Acts which followed the revolution of 1688.

141 U.S. at 193-94.

The power to control judicial tenure "exerted a most baleful influence upon the administration of justice, destructive of private rights and subversive of the liberties of the subject." *Id.*; cf. William H. Rehnquist, *Why a Bill of Rights is Not Enough*, 15 Wilson Q. 111, 113 (1992) (noting power of French Convention to add and remove judges and jurors at pleasure; "[i]t would be difficult to imagine a formula more certain to produce despotism").

pendence involves the Court of Military Appeals itself. In 1992, Congress for the first time provided that the chief judge of that court would serve as such for five years, *see* National Defense Authorization Act of Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315; UCMJ Art. 143(a)(3)-(4), 10 U.S.C.A. § 943(a)(3)-(4) (West. Supp. 1993), in contrast to earlier practice under which the position was freely transferable by the President. The legislative history cites increased judicial independence as one of the purposes of the change. S. Rep. No. 102-352, 102d Cong., 2d Sess. 278 (1992); H. Conf. Rep. No. 102-966, 102d Cong., 2d Sess. 758 (1992).

International law and fixed terms of office. Finally, the connection between fixed terms and judicial independence is reflected in international norms. *The Basic Principles on the Independence of the Judiciary*, reproduced in *Centre for the Independence of Judges and Lawyers Bull.* Nos. 25-26, 14-21 (Apr.-Oct. 1990), and *Lawyers Committee for Human Rights, In Defense of Rights: Attacks on Lawyers and Judges in 1991* 175-78 (1992), were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and later endorsed by The General Assembly. They provide that "[t]erms of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law." "Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age, or the expiry of their term of office, where such exists."

The Court of Military Appeals and fixed terms of office. Notwithstanding the widespread recognition that fixed terms are essential to judicial independence, the Court of Military Appeals reasoned that at-will judges are not required for the military because American and British military justice historically did not give judges fixed terms of office. *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992). This approach is mistaken because the

analysis of legal tradition in due process cases arising under the UCMJ is not properly confined to *military* legal tradition. Rather, it extends to the broader legal traditions of our society. It was therefore circular (assuming *Medina v. California*, 112 S. Ct. 2572 (1992), has any application to Fifth Amendment due process) for the court below to confine its analysis of what legal tradition deems fundamental to the narrow field of military justice. Such a limited focus avoids the very kind of inquiry *Medina* contemplates, just as if a state were allowed to argue that a particular safeguard was not required by Fourteenth Amendment due process because that state had itself never afforded it to criminal defendants.

An example of the correct procedure is found in *Herrera v. Collins*, 113 S. Ct. 853 (1993). There the Court was called upon to determine the application of due process to Texas's new trial practice. In doing so, it went far beyond that one state's new trial jurisprudence, surveying English, colonial, early and current state practice, early federal legislation, and the evolution of Fed. R. Crim. P. 33. *Id.* at 864-66. The Court of Military Appeals failed to perform this kind of broad, multi-jurisdictional inquiry either in this case or in *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992) on which it relied. Had it done so, it would have had to conclude that fixed terms of judicial office are overwhelmingly deemed a required element of criminal justice. *Herrera* is also noteworthy because the Court correctly found the states' present practices too divergent to count for much in the due process equation. In sharp contrast, as far as we can determine, no state uses at-will judges in felony cases.

But even if we have misread *Herrera* and *Medina*, the Court of Military Appeals single-minded reliance on past military justice practice was mistaken for the simple reason that, as discussed above, the office of military judge has not existed for centuries. Thus, no long tradition supports the armed services' practice of having their judges

serve on an at-will basis because there is no long tradition of military judges at all.

The leading 19th and 20th Century treatise on military law pointed out that "the judge advocate in our procedure [is] *neither a judge*, nor, properly speaking, an advocate, but a prosecuting officer with the added duty of legal adviser to the Court, and a recorder" (emphasis added). William Winthrop, *Military Law and Precedents*, 179 (2 ed. 1920). The advisory functions served by the judge advocate were a far cry from the decisive power expected to be exercised by federal and state judge and, at least since 1968, by military judges and Court of Military Review judges. Because the judge advocate of olden days was no more a judge than the Solicitor General is a general, the history cited by the government in opposing certiorari and by the court below is of limited value in determining what due process requires.

British military justice is of limited value when resolving due process concerns. British military legal tradition is of limited value to the case at bar because Britain did not historically have a military bench. At present, her Army and Air Force courts-martial include a judge advocate who functions much like the law officer formerly used in American courts-martial. The court receives its legal advice from a judge advocate who is a civilian barrister serving on the staff of the Judge Advocate General by appointment of the Lord Chancellor. J.K. Venn, *Military Justice—An Oxymoron?*, 141 N.L.J. 524 (1991). These officials also sit as magistrates in the Standing Civilian Courts which Parliament has created to try civilians or dependents attached to the British forces abroad. Armed Forces Act, 1976, § 6(4) (Eng.). Assistant and deputy Judge Advocates General are appointed by the Lord Chancellor and are removable only for "inability or misbehaviour." Courts-Martial (Appeals) Act, 1951, § 32(1). The Judge Advocate General may also employ temporary assistants. *Id.* § 30(2). They "hold and va-

cate office in accordance with the terms of [their] appointment," *id.* § 32(3), and we are advised by the Ministry of Defense that in fact such appointments are for fixed periods.

In summary, the connection between judicial terms of office and substantive fairness is one that the Anglo-American legal tradition, consistent federal and state practice and international norms combine to place beyond the pale of reasonable debate.

B. The Substitute Protections Relied On By the Court of Military Appeals as a Basis for Holding That Fixed Terms of Office Are Not Required Are Illusory.

The Court of Military Appeals has invoked other procedural safeguards as a substitute for fixed terms. *Graf*, 35 M.J. at 463. These protections are illusory and not an efficacious substitute for fixed terms. They did not protect petitioners' right to an independent bench at trial and on appeal.

In the military justice system, transfer from judicial duties is the functional equivalent of removal. The removal power renders the removable official subservient to the holder of the power. *Bowsher v. Synar*, 478 U.S. 714, 727-32 (1986). "The implicit and omnipresent threat that a . . . judge can be removed immediately without cause hangs like a sword of Damocles above his bench as he rules on cases." *People v. Horan*, 556 P.2d 1217, 1221 (Colo. 1976) (en banc), cert. denied, 431 U.S. 966 (1977) (Carrigan, J., dissenting). Such a sword hangs over the heads of military judges in every case.

The UCMJ does not adequately insulate judges from potential pressure. For example, a 1984 study found that 25% of military trial judges and 24% of Court of Military Review judges were aware of instances in which a military judge was threatened with reassignment or actually reassigned because of his or her decisions. 2 Dep't of Defense, *The Military Justice Act of 1983 Advisory*

Commission Report 365 (1984) (table 1).² Substantial proportions of those involved in the administration of military justice believe that guaranteed terms would create a more independent and fairer military judiciary. 2 Dep't of Defense, *The Military Justice Act of 1983 Advisory Commission Report* 406 (45% of convening authorities), 505 (50% of staff judge advocates), 618 (56% of military judges), 737 (47% of Court of Military Review judges), 836 (60% of trial counsel (prosecutors), 951 (78% of defense counsel) (1984).

The court below claimed in *Graf*, that "decisions of this [c]ourt, including today's, . . . prohibit adverse removal action" on the basis of dissatisfaction with a judge's judicial actions. *Graf*, 35 M.J. at 466 (emphasis added). The implication that prior decisions so held is false. Neither of the cases the court cited stands for the quoted proposition. Indeed, in *In re Taylor*, 12 U.S.C.M.A. 427, 31 C.M.R. 13 (1961) and *In re Taylor*, 13 M.J. 204 (C.M.A. 1982) (mem.), the court twice declined to entertain a request by a "law officer," for review of a decision to remove his certification. The leading treatise on military justice correctly reported in 1991:

There appear to be . . . no restrictions at all on denying "reappointment" (e.g., reassignment as a judge)

² If anything, these data understate the Navy and Marine Corps reality since the integrity of the survey was compromised in a way that "may have biased the data by causing respondents to provide answers that conformed to their expectations of what Navy JAG authorities wanted to hear." 2 *id.* 1374. A growing list of cases has highlighted the vulnerability of the military bench to undue and improper influence. *E.g.*, *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991); *United States v. Allen*, 31 M.J. 572 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991), cert. denied, 112 S.Ct. 1473 (1992); *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988); see generally Joseph H. Baum & Kevin J. Barry, *United States Navy-Marine Corps Court of Military Review v. Carlucci: A Question of Judicial Independence*, 36 Fed. B. News & J. 242 (1989); see also *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976).

to a military judge whose conduct is considered unsatisfactory. Thus, although neither command channels nor the Judge Advocate General may complain to a judge about findings or sentence, the lack of tenure permits reassignment of the judge for those very reasons. Further, as all assignments are made pursuant to "the needs of the service," it is by no means clear that a judge could not lawfully be reassigned out of the judiciary because of dissatisfaction with his or her results.

1 Gilligan & Lederer, *supra*, § 14-80.00, at 555.

Thus, whatever the effect of the alternative protections relied on by *Graf*, there was, at the time *these* cases were tried, no authority for the proposition that retaliatory transfers were illegal. Nothing protected the judges who presided at petitioners' trials and Court of Military Review appeals from the chilling effect of their lack of fixed terms and exposure to reassignment out of the judiciary. The Court of Military Appeals candidly admitted that it was announcing a new rule. *Graf*, 35 M.J. at 463. However inadequate that rule is, petitioners are at least entitled to its benefit. *Griffith v. Kentucky*, 479 U.S. 314 (1987).

The *Graf* court claimed that its conclusion was confirmed by the enactment of Article 6a of the Code, 10 U.S.C.A. § 806a (West. Supp. 1993), *Graf*, 35 M.J. at 465, but that provision, too, was no help to petitioner Weiss because it was enacted months *after* his trial. National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1303, 103 Stat. 1576. What is more, Article 6a has nothing to do with the power to reassign. Rather, it deals with "the investigation and disposition of charges, allegations, or information pertaining to the fitness of a military judge or military appellate judge to perform the duties of the judge's position." Congress put such a structure into place so that the Court of Military Appeals would not have to make up the rules as it goes along, as it did in *United States Navy-Marine Corps*

Court of Military Review v. Carlucci, 26 M.J. 328 (C.M.A. 1988). But nothing in this recent measure addresses the concern underlying the cases at bar. The armed services retain the power to reassign military judges, and may do so in preference to going through the procedures for suspension or decertification for cause. Neither Article 6a nor its implementing regulations confers on the judge the right to demand a hearing on the theory that a transfer was retaliatory.

Even if, at the time of petitioners' trials and intermediate appeals, the law had been as the *Graf* court later declared it to be, the alternative remedies it cited would not excuse the lack of fixed terms. Article 98(1) of the UCMJ, 10 U.S.C. § 898(1) (1988), makes it a crime to "knowingly and intentionally fail[] to enforce or comply with any provision of [the Code] regulating the proceedings before, during, or after trial." This affords no protection against the chilling effect of a lack of fixed terms. It has been aptly described as a "dead letter." *Moyer, supra*, § 3-361, at 780. In nearly 40 years, there have been, at most, two prosecutions under it. *Compare id.* (one case, in 1953) with 1 Gilligan & Lederer, *supra*, § 17-43.00, at 639 (two cases, neither of which resulted in a sentence serious enough to occasion a reported decision). "In theory, persons who violate the article 37 proscriptions against command influence may be prosecuted under article 98; in practice, that notion is ludicrous." *Moyer, supra*, at 779.

The alternative remedies are also no answer to petitioners' due process claim because they rely on the military judge (who may well not wish to "rock the boat") to lodge a complaint if he or she is subjected to a transfer from judicial duties. *See id.* at 780 (noting futility of expecting command influence victim to prefer charges). The judge will typically have no evidence that the transfer was retaliatory, yet the burden would be on him to prove retaliation. Hard evidence will rarely if ever be avail-

able, much less will there be proof that the action was done knowingly and intentionally, as Article 98(1) requires. "Smoking guns" are unlikely to appear where transfers can easily be palmed off as routine or dictated by the "needs of the service."

Whether relief is sought under Article 138, 10 U.S.C. § 938 (1988), or by application to the board for correction of military or naval records, 10 U.S.C.A. § 1552 (West Supp. 1993), the judge will have no right to discovery. Worse yet, Article 138 complaints and record-correction proceedings are conducted out of the public eye. The consequence is that, on top of all else, the accused might well be the last person to learn about a matter directly affecting his or her right to an independent judge.

The *Graf* court's alternative suggestion that, if all else fails, a judge who is threatened with a retaliatory transfer may seek an extraordinary writ, *Graf*, 35 M.J. at 463, is no more comforting to an accused. Passing over the substantial question as to whether such a writ would be in aid of the court's jurisdiction, as required by the All Writs Act, 28 U.S.C. § 1651(a) (1988), the judge would have to file within 20 days of learning of the action complained of, C.M.A.R. 19(d), and would still have no right to discovery. Obviously, filing an extraordinary writ against one's military superior would be public, but that very circumstance suggests that only the most courageous military judge would invoke this remedy.

As desirable as moral courage may be, . . . the presupposition that there should be adverse consequences to oneself for doing what one ought to do suggests that something is wrong. The administrative framework in which the military judiciaries operate should promote judicial independence affirmatively, not by taxing the moral courage of the judges to compensate for adverse structural conditions, which, by their very existence, create a perception

of judicial self-interest in the outcome of decisions among the judges themselves, accused, and members of the public.

United States v. Mitchell, — M.J. —, — (N.M.C.M.R. (1993) (en banc) (Freyer, Sr. J., concurring).

In addition to being unrealistic, the remedies cited in *Graf* are unworkable. If, by some miracle, a judge were able to prove that a retaliatory transfer had occurred, a mass nest of problems would ensue in trying to determine which prior cases might have been infected. This difficulty is further complicated because the chilling effect of a retaliatory transfer might well be felt not only by *that* judge, but by *other* judges who learn of it. The Department of Defense's 1984 study demonstrates that military judges do hear about it when their brethren and sisters are threatened with transfer or actually transferred as a result of their decision making. See, 2 Dep't of Defense, *The Military Justice Act of 1983 Advisory Commission Report* 365 (1984) (table 1). In this respect at least it is true, as the Court of Military Appeals has recognized, that "[w]ord travels fast in the military." *United States v. Levite*, 25 M.J. 334, 339 (C.M.A. 1987). And which of the cases the other judges presided over would have to be set aside? Ultimately, the problem is not so much the judge who has been transferred, but the judge who *fears* transfer.³

³ When, in 1616, Montagu was installed as Coke's successor as Chief Justice of the Court of King's Bench, Lord Chancellor Ellesmere pointedly noted that the vacancy being filled was caused not by some normal evolution but by the dismissal of an incumbent, referring to the circumstances as "a Lesson to be learned of all, and to be rememb[er]ed and feared of all that sit in Judicial places." 72 Eng. Rep. 931 (No. 1114) (emphasis added); see Fidell, *Military Judges and Military Justice: The Path to Judicial Independence*, 74 *Judicature* 14 & n.3 (1990). Montagu got the point. While boasting that he would be courageous, he also assured Ellesmere that, among other things, he would not be "a heady Judge." 72 Eng. Rep. 932, 933 (No. 1115).

Petitioners are far from alone in questioning the efficacy of the alternative protections relied on by the Court of Military Appeals. The very day certiorari was granted, the Navy-Marine Corps Court itself recognized in *Mitchell*, — M.J. —, the “severe limitations” on redress for military judges through the usual means. The case concerned the threat to judicial independence from the fact that the judges of that court receive fitness reports drafted by an Assistant Judge Advocate General whose job includes supervision of the appellate prosecutors. While ultimately ruling against *Mitchell*, Chief Judge Larson observed that the ability of a superior to exact retribution through the “subtle shading” of a fitness report “may not provide a sufficient basis for relief through” methods such as those relied on in *Graf*. *Mitchell*, — M.J. at —. As a result, the court “place[d] little reliance on these means of redress as a safety net against the improper use of a fitness report. . . .” *Id.* Senior Judge Freyer, concurring, properly faulted the dispositions in *Mitchell*, — M.J. —, *Mabe*, 33 M.J. 200, and *Graf*, 35 M.J. 450, on the ground that they are

almost wholly lacking in any practical mechanism for preventing, detecting, or remedying violations. Unless a reporting senior is clumsy enough to insert objectively prohibited comments in the narrative section of a fitness report, the report can be made virtually inscrutable. The Board for Correction of Military Naval Records and Article 138 are useless in such cases

— M.J. at — (emphases added); see also *id.* at — (Reed, J., concurring in the result). Having thus acknowledged the practical unavailability of meaningful redress to judges in the context of the fitness report system, the *Mitchell* court was compelled to rely instead on the notion

that the JAG’s best interest lies in preserving, not undermining, judicial independence and on the presumptions that the JAG will recognize and faithfully

execute his duty to preserve our independence and that the judges of this Court will have the integrity and moral courage to steadfastly resist any attempt at undermining that independence.

— M.J. at —. This claim—which dramatically illustrates how the Appointments Clause violation exacerbates the due process violation—is not enough. As Judge Reed, concurring in the result, cautioned, “generally the JAG’s best interest lies in preserving judicial independence. At times, however, the JAG’s and the military leadership’s concerns may be contrary to those of the Court [of Military Review]. . . . At times, these concerns are in direct conflict. . . .”

Id. at — (emphasis in original, citations omitted). In a similar vein, a former judge of the Air Force Court of Military Review has written:

The claim that the system works “well enough” does not finish off the bogeyman skulking just below the surface. Consider a horrible possibility: a new Judge Advocate General is appointed; for some reason, that individual has little appreciation for the role of appellate judges and opines that Judge X isn’t “really one of us” or that a given opinion i[s] wrong. Later, that judge fails of promotion or receives an undesirable assignment. These alternatives are possible within the present structure. *That it seldom happens is not due to fail-safe mechanisms internal to the Uniform Code. Rather, success rests upon the fundamental decency and objectivity of incumbents at the star and flag level.*

Joseph W. Kastl, “I’ve Got the Heebie-Jeebies”: *The Four Toughest Questions in Military Justice*, 38 Fed. B. News & J. 216, 217 (1991) (emphasis in original).

The approach taken by the court below (and, more recently, by the Navy-Marine Corps Court in *Mitchell*, — M.J. —) is cold comfort to military defendants. They are entitled to surer protection of judicial inde-

pendence than either the judges' personal courage and integrity or the Judge Advocate General's ability or willingness to discern that his best interest lies in preserving judicial independence, or his "fundamental decency and objectivity." Military personnel are entitled to have their due process rights rest on a firmer foundation than the varying personal confidence levels of career-officer judges that the rule against retaliatory transfer announced by the Court of Military Appeals will in fact be observed even if there are no effective procedures for detecting or proving violations and no viable sanctions even if there were. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); see also *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 177 (1951) (Douglas, J., concurring). There is no reason to demand that those who bear arms in the service of the Nation must settle for promises rather than protection when it comes to judicial independence. As President Reagan said in the context of nuclear arms reduction, "trust, but verify."

Because a proper analysis shows that fixed terms are required under either *Matthews* or *Medina*, the only remaining question is whether something inherent in military justice precludes application of the normal rules for due process. As we explain below, the Court of Military Appeals was unable to point to any such special circumstances.

C. Fixed Terms of Office Are Not Precluded By Unique Needs of the Military and Do Not Entail Significant Fiscal or Administrative Burdens.

The unique needs of the armed forces must be considered when determining how the Constitution applies to military personnel. *E.g.*, *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Brown v. Glines*, 444 U.S. 348 (1980). No such needs preclude fixed terms of judicial office. Moreover, the unique circumstances of the military argue for, rather than against, the relief petitioners seek because the military personnel structure—including those who per-

form judicial duties—is pervasively hierarchical. Deference to superiors is integral to the military way of life. This renders it *more*, rather than *less*, urgent that uniformed judges have the protection of fixed terms.

The Navy has never argued that fixed terms would be a burden. Its only justification below—advanced in *Graf*—for failing to provide fixed terms was that courts-martial are ephemeral, *i.e.*, a new court-martial must be appointed for each case. This claim obviously overlooks the Courts of Military Review, which are standing bodies. Moreover, the argument is completely unrealistic as to the trial courts because the Navy maintains a standing trial judiciary with geographically-defined circuits, rules of court, docketing systems, and a constant flow of cases. The Court of Military Appeals chose not to dignify the Navy's theory by addressing it in its opinion in *Graf*, 35 M.J. 450.

Even in opposing certiorari, the government did not argue that military exigencies preclude fixed terms of office for military judges, thus abandoning the one justification it attempted below. This retreat requires that it defend on the more fundamental ground that due process tolerates reliance on at-will judges in *any* system of criminal justice. But the government also failed to offer any meaningful defense of this proposition, blandly noting that "[s]tates are free to select terms of office for persons who hold any such position." *Graf* Opp. 7. This formulation, of course, does not address whether the states are equally free to decide to give their judges *no* fixed term at all, as the military does.

For its part, the Court of Military Appeals also made no effort to defend the lack of fixed terms on practical grounds, and could point to no unique military needs that preclude fixed terms. Still the factors that have been looked to in the past when seeking to justify departures

from civilian norms⁴ in no way detract from petitioners' due process position. These factors include "overriding demands of discipline and duty," *Burns v. Wilson*, 346 U.S. 137, 140 (1953), readiness, *Curry v. Secretary of the Army*, 595 F.2d 873, 877 (D.C. Cir. 1979), morale and "orderly processes." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955). While generally not included on these lists, cost has been considered a pertinent factor in due process analysis, although the cases recognize that achieving due process may cost money.

Readiness and flexibility would be unaffected by the introduction of fixed terms. Only about 3% of active duty judge advocates serve in general court-martial and Court of Military Review judicial billets. Many of them surely serve normal tours of duty. As a result, elevating normal tours into fixed terms would have no appreciable impact on personnel management flexibility. *Bozin v. Secretary of the Navy*, 657 F. Supp. 1463 (D.D.C. 1987); see also 2 Dep't of Defence, *The Military Justice Act of 1983 Advisory Commission Report* 1153 (1984) (letter from Lt. Col. Alves to Col. Thomas L. Hemingway, May 24, 1984) (three-year term sufficiently flexible for proper personnel management).

Due process would not be offended if exceptions were made for times of war or insurrection, see *Généreux v. Her Majesty the Queen*, 1 S.C.R. at 313 (1992); *Graf*, 35 M.J. at 466, mobilization, demobilization, and reductions in statutory authorized strength. This is in keeping with both the Court's willingness to acknowledge the role of military operational requirements and its commitment to careful scrutiny of operational necessity claims to ensure that they do not exceed or outlive their basis

⁴The burden is on the government to justify such variations. E.g., *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979); *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976); *United States v. Knudson*, 4 U.S.C.M.A. 587, 591, 16 C.M.R. 161, 165 (1954).

in fact. Thus, in *Louisiana ex rel. Handlin v. Wickliffe*, 79 U.S. (12 Wall.) 173 (1870), the Court permitted the removal of a judge in the course of the military occupation of New Orleans, relying on wartime conditions not present in this case. Similarly, in *Duncan v. Kahanomoku*, 327 U.S. at 313, 326-28, 329-30, 337 (1946), the Court considered the progress of the Second World War in deciding whether martial law could still be justified in the Territory of Hawaii months and years after the Japanese attack on Pearl Harbor.

The interest in "orderly processes" is served by fixed terms which reduce uncertainty about personnel transfers. The military is expert at establishing systems; given its size and complexity, it has to be. There can be little doubt that the armed services would quickly make the arrangements needed to implement fixed terms. At that point, new "orderly processes" would be in place, and this particular consideration would drop out of the due process equation.

Procedural safeguards must be afforded "if that may be done without prohibitive cost," *Goss v. Lopez*, 419 U.S. 565, 580 (1975), although "it is doubtful that cost alone can ever excuse the failure to provide adequate process." *Propert v. District of Columbia*, 948 F.2d 1327, 1335 (D.C. Cir. 1991), citing *Fuentes v. Shevin*, 407 U.S. 67, 90 n.22 (1972). Here, cost weighs in favor of petitioners' due process argument since fixed terms would, if anything, entail less frequent transfers. Of course, to the extent that the armed services already keep their judges in place for normal tours of duty, see 1 Gilligan & Lederer, *supra*, § 14-31.00, at 519 (1991), cost drops out as a factor.

Long before these cases, the Navy was willing to accept two-year terms of office for general court-martial and Court of Military Review judges. Thus, in response to a proposal by the Association of the Bar of the City of New York, see Ass'n of the Bar of the City of New

York, Comm. on Military Justice and Military affairs, *A Bill to Improve the Military Justice System* (1977), discussed in Eugene R. Fidell, *Judicial Tenure Under the Uniform Code of Military Justice*, 31 Fed. B. News & J. 327, 331 (1984), the Department of Defense's Joint-Service Committee on Military Justice supported a two-year term for Court of Military Review judges, but divided over the terms of office for trial judges. The Army favored "limited tenure after a probationary period, with provision for releasing an officer from judicial duties due to abolition of his position, or at his request, or upon his appointment as appellate judge." The Navy was willing to accept terms not to exceed two years. This seriously undermines any contention that the protection petitioner seeks would represent a substantial, much less an intolerable burden on the service.

Nations that share our legal traditions, as well as those that do not, have found it workable to afford military judges the protection of fixed terms. Thus, Canada, another federal union with common law traditions, recently addressed the due process issue presented in this case. In *Généreux*, 1 S.C.R. 259 (1992), the Supreme Court of Canada agreed that fixed terms of office are required for court-martial judges to satisfy § 11(d) of the *Charter of Rights and Freedoms*, which provides that

Any person charged with an offence has the right . . . to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

The Canadian Court-Martial Appeal Court had earlier reached the same conclusion in *R. v. Ingebrigtsen*, 61 C.C.C.3d 541 (C.M.A.C. 1990). Rather than appealing *Ingebrigtsen*, the Ministry of Defense modified the *Queen's Regulations and Orders* ("QR&O") (Canada's equivalent of the *Manual for Courts-Martial*) to provide that officers performing judicial duties shall be appointed for "a fixed term" which "shall normally be four years

and shall not be less than two years." QR&O art. 4.09. Such officers performing judicial duties may be removed before the expiration of their term only for just cause, upon the officer's written application, acceptance of a promotion, or retirement. *Id.* arts. 4.09(6), 11.354(5). *Généreux* noted these changes with approval. *Graf*, 35 M.J. at 466.

The legal traditions of the former Soviet Union are of course far removed from those of the common law countries. This makes it all the more remarkable that Soviet military judges were protected by fixed terms of office. Jody M. Prescott, *Soviet Military Justice and the Challenge of Perestroika*, 123 Mil. L. Rev. 129, 131-32 (1989); Michael N. Schmitt & James E. Moody, *The Soviet Military Justice System*, 34 A.F. L. Rev. 1, 28 & n.235 (1991). With the advent of *perestroika*, the term of office was extended from five years to ten. *Id.* at 28 & n.238; Michael N. Schmitt, *The Judicial and Non-Judicial Punishment Systems of the Soviet Armed Forces*, 4 J. Sov. Mil. Studies 87, 102 & n.50 (1991).

If nations with such divergent legal traditions and military postures as these can accommodate fixed terms for military judges, it is difficult to treat seriously the notion that there is anything inherent in military affairs that precludes them for this country's soldier- and sailor-judges.

In summary, on one side of the scale is petitioners' compelling interest in being tried before an independent judge before being sent to prison and subjected to the lifetime stigma of a punitive discharge. On the other side, so far as can be determined from *Graf* or the decisions below, there is nothing. The nature of the military command structure adds to the need for judicial officers protected by fixed terms of office. Fixed terms of office would substantially bolster judicial independence and public confidence in this important system of criminal justice, without imposing significant administrative burdens. Due process mandates this protection.

D. Neither This Court Nor Congress Has Determined That the Armed Forces' Practice of Not Affording Judges the Protection of Fixed Terms of Office Comports With Due Process.

The Court of Military Appeals claimed in *Graf*, 35 M.J. 450, that this Court's failure in *Toth*, 350 U.S. 11, and *Palmore v. United States*, 411 U.S. 389 (1973) to disapprove the military's at-will arrangements for judges represents a "deafening" silence. *Graf*, 35 M.J. at 464. The point is not well taken. It disregards what was at issue in those cases, as well as the terms of the UCMJ that were in effect when *Toth* was decided. *Toth* was decided long before enactment of the Military Justice Act of 1968, which created the military bench. It regarded the absence of terms of office for the law officers who at the time presided at general courts-martial not as a system *strength*, but as a *shortcoming* which militated *against* the exercise of court-martial jurisdiction in the circumstances there presented.

For its part, *Palmore* rejected a claim that the Fifth Amendment requires *life* tenure for the fixed-term judges of the Superior Court of the District of Columbia. 411 U.S. at 410; see D.C. Code § 11-1502 (1981 ed.) (15-year terms). The case did not address the situation where judges have no fixed term at all, and its passing reference to the military justice system, citing *Toth*, cannot be seriously taken as a ruling on the issue.

The government relies on what it describes as "Congress's decision not to grant tenure to military judges." *Graf*, Opp. 10. Congress has made no such decision. The government cites nothing to indicate that Congress made any specific determination as to the need for terms of office when it created the military bench. Congress later commissioned a study of the matter, among others, Military Justice Act of 1983, Pub. L. No. 98-209, § 9(b)(1) (D), 97 Stat. 1404, but has yet to hold a hearing on the subject. There are divers plausible explanations for the

lack of congressional action, including "(1) approval of the status quo, as opposed to (2) inability to agree upon how to alter that status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." *Johnson v. Transportation Agency*, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting). As a result, it is improper to draw inferences from it one way or the other. E.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989); *Girouard v. United States*, 328 U.S. 61, 69 (1946). In any event, even if Congress's inaction were properly viewed as a "decision" to approve the services' practice of requiring military judges to serve without the protection of fixed terms, that would not absolve this Court of its duty to enforce the Constitution's guaranty of due process.

In opposing certiorari, the government also advanced a superficially appealing textual argument which, upon analysis, proves to be entirely untenable. It suggested that since the Constitution elsewhere prescribes particular terms of office for the President, Vice President, Senators, Congressmen and Article III judges, due process cannot make any terms-of-office demands for other officials such as military judges. *Graf* Opp. 6 & n.4. But if the Constitution were read in the cramped fashion suggested by this *expressio unius* argument, none of the specific guarantees of the Bill of Rights would ever have been applied to the states. See *Palko v. Connecticut*, 302 U.S. 319 (1937). Nor would Fifth Amendment due process have been found to contain an equal protection component, since that concept appears in *haec verba* only in the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Similarly, because the Contract Clause applies on its face only to the states, the government's mechanical approach would preclude finding an analogous restriction on the federal government in Fifth Amendment due process. Yet the cases recognize such a restriction, even though the Framers explicitly refused to subject federal legislation impairing private contracts to the literal re-

quirements of the Contract Clause. *Pension Benefit Guaranty Corp. v. Gray & Co.*, 467 U.S. 717, 733 & n.9 (1984) (proposal to extend Contract Clause to federal government failed for lack of a second at 1787 Convention).

In conclusion, due process requires military trial and appellate judges be afforded the protection of fixed terms.

CONCLUSION

For the foregoing reasons, the decisions of the Court of Military Appeals should be reversed and the cases remanded for further proceedings before military trial and appellate judges appointed in accordance with the Appointments Clause for fixed terms of office.

Respectfully submitted.

ROBERT I. SMITH
Captain, United States Air Force
Counsel of Record

JAY L. COHEN
Lt. Colonel, United States Air Force
Chief, Appellate Defense Division

FRANK J. SPINNER
Lt. Colonel, United States Air Force
Chief Appellate Defense Counsel

Appellate Defense Division
Air Force Legal Services Agency
172 Luke Avenue, Suite 208
Bolling AFB, DC 20332-6128
(202) 767-1562

Counsel for Amicus Curiae

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